Supreme Court, U.S.
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No. 95-987

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1995

CLARK GAREN,

Petitioner,

vs.

SUPREME COURT OF NEVADA,
BOARD OF BAR EXAMINERS OF THE
STATE BAR OF NEVADA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION

This Court has jurisdiction over this matter under 28 U.S.C. 1257(a) because this is a final judgment rendered by the highest court of a state where a title, right, privilege, or immunity is claimed under the Constitution of the United States. The Petition cites the wrong Code section, but also cites other authorities establishing jurisdiction, so Respondent is not prejudiced by the incorrect citation.

II. FEDERAL QUESTIONS WERE PRESENTED

Respondent's brief concedes Petitioner presented denial of procedural due process to the Nevada Supreme Court. Respondent claims Petitioner was inept in the presentation. This Court considers any issue raised before the lower court, including one presented ineptly. (Konigsberg vs. State Bar of California, 1957 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d. 810)

Denial of Procedural Due Process is a factual issue. The Nevada Supreme Court reviewed the transcripts of the hearings establishing the lack of procedural due process, and elected to ignore the merits of the argument and rule on technical matters. Respondent now limits its defense of due process to technical issues, again ignoring the merits. Perhaps Respondent does not address the merits because Petitioner really was denied due process.

For example, the Nevada Supreme Court rules require Petitioner to pay for a transcript of all hearings, but do not provide for Petitioner to be given a copy. Respondent has **never** given Petitioner a transcript of the proceedings. The Respondents are given copies of the transcripts, and copies of the hearing transcripts were even given to the State Bar of Washington, despite the confidentiality requirement of Nevada Supreme Court Rule 70.5. Transcripts are made available to everyone but the Petitioner! So much for procedural due process.

III FAILURE TO PAY A FINANCIAL OBLIGATION

The standards for admission in Minnesota and in Florida have **nothing to do** with the admission standards in Nevada. The failure of the Respondent to cite one single **Nevada** case in which admission was denied or discipline imposed because of failure to pay student loans or any other creditor proves that Nevada is only imposing this standard on Petitioner!

In 1994, Nevada admitted a felon after his conviction for being a major drug smuggler. (In Re Birmingham, 110 Nev. 70, 866 Pac. 2d 1150)

In Nevada, conviction of willful failure to file Federal Income Tax Returns is not a crime of moral turpitude (In Re Cochrane, 92 Nev. 253, 549 Pac. 2d 328)

In Nevada, the filing of false federal income tax returns is not a basis for discipline. (State Bar vs. Claiborne, 104 Nev. 115, 756 Pac 2d 464)

In Nevada, the failure to pay spousal and child support and forgery of notes is not a basis for denial of admission. (Ex Parte Abbatangelo, 80 Nev. 519, 746 Pac. 2d 143)

In Nevada. cheating on the L.S.A.T. is not a basis for denial of admission. (In Re Waters, 84 nev. 712, 447 Pac. 2d 661.

Respondent has failed to address or distinguish any of these prior admissions, and instead justifies its action on decisions from other jurisdictions. By not addressing these issues, Nevada appears to concede it applied **different** standards to Petitioner, presumably **because** he is a graduate of a non A.B.A. California law school.

In Application of Gahan, (1979) 279 N.W. 2d 826, the applicant obtained the benefits of education by student loans; then arranged his property exemptions to keep everything intact (including his Jaguar automobile) except the student loan obligation, and then discharged the obligation in bankruptcy even through he could afford to have paid the loan. In Florida Board of Bar Examiners, Re: G.W.L., (1978) 364 So. 2d

454, Florida also denied admission to an applicant who could have paid his student loan but elected not to do so.

Repayment of student loans is an emotional issue **because** it was wrong for students to make a living with their education without having to pay for it. This view is reflected in the Gahan decision, supra, on page 831:

> "A student loan is **entrusted** to a person, and is to be repaid to creditors upon graduation when and if financially able. ... A flagrant disregard of this repayment responsibility by the loan recipient indicates to us a lack of moral commitment to the rights of other students and particularly the rights of creditors. Such flagrant financial irresponsibility reflects adversely on an applicant's ability to manage financial matters and reflects adversely on his commitment to the rights of others, thereby reflecting adversely on his fitness for the practice of law."

An unpaid property tax lien is different than a defaulted and discharged student loan. **Nothing** was **entrusted** to the Petitioner! No rights of other students or creditors were disregarded by Petitioner. Petitioner exercised his first amendment right of free speech to not pay a single, disputed tax lien he felt was wrong and unfair, and did nothing to stop the governmental agency from collecting the lien.

Excerpts from the transcript of the hearing (obtained from the State Bar of Washington) is a more accurate reflection of the testimony.

> Q. Are they a legitimate charge? Do you owe the money?
>
> A. I don't think they're legitimate. That's why I haven't paid them. I went through a hearing process and I established that what -- I established what I acquired them for.

And basically the -- I didn't feel I got a fair hearing from the Board on the issue. I was very distressed with they way they did the values.

Q. But you did have a hearing?

A. Yes, I had a hearing.

Q. Presented your cases?

A. I presented my case. I didn't think it was a fair hearing because I felt the board had already made up their minds in terms of what they were going to do. But I did have a hearing.

Q. And lost.

A. And lost.

Q. Did you take whatever appellate procedures were available to you to challenge that decision?

A. No, I did not.

Q. Now you're going to let it sit?

A. Now I'm going to let it sit. They will eventually end up collecting it when I sell something else in Los Angeles County.

Q. Do you own any other assets in Los Angeles County?

A. No, but I will. I will eventually have a parcel that would basically come to me through inheritance which I will have to sell -- I won't have to sell it, but I will sell it, and they'll end up getting paid.

Q. Do you think that attitude towards that legitimate debt or at least one you haven't thought was challengeable is a good attitude for a lawyer who may lose a case from time to time or have an adverse result for a client, is that the sort of advice you would give your client, don't worry about it?

A. Well, that isn't necessarily the advice I would give my client. I was very upset about it and this is my own affair and this is how I elected

to handle it.
Transcript, August 19, 1994, pp 57-58

Based on this testimony, Respondent finds Petitioner "had no intention of discharging or challenging the validity of the liens. He indicated he was going to allow the liens to languish, and if he ever sold any other real property in California he would pay the liens at that time" and concludes "The failure to satisfy the lawful tax liens in Los Angeles County and the applicant's cavalier attitude toward them establish his utter disregard and disrespect for lawful process." (Petition, Appendix H.) **This testimony does not support these findings!**

Petitioner exercised his right of free speech. Petitioner did not fail to honor his legal commitments in a way that reflects adversely on his ability to practice law. Petitioner did not show "flagrant financial irresponsibility reflecting adversely on an applicant's ability to manage financial matters and reflects adversely on his commitment to the rights of others, thereby reflecting adversely on his fitness for the practice of law."

Respondent's Brief shows this is an **isolated** instance not reflecting any financial instability of Petitioner or the ability of Petitioner to practice law. Respondent's Brief shows your Petitioner is financially stable and quite able to manage his financial matters. The testimonials attached as Appendix B show a strong commitment on the part of Petitioner to protect the rights of others.

Petitioner's presentation of the Abbatangelo case **is** accurate. Abbatangelo did not pay his child support or alimony and he did forge his wife's name to notes! The rationale for disregarding these actions is not relevant. The relevant fact is that Petitioner is the only applicant ever refused admission to Nevada for non-payment of a $3,000 property tax lien.

IV LETTERHEAD ISSUES

Respondent's Brief on the letterhead shows the inquisition Petitioner is subjected to.

Respondent quotes Petitioner "I don't remember sending it to anybody in the State of Nevada. It may have gone, but I don't remember sending it to anybody there" and claim this is contradicted by the statement, "Petitioner made no solicitations and corresponded **only** with existing clients or opposing attorneys in California and Texas."

There **is no** contradiction! Petitioner was **not asked** if he used the letterhead to solicit clients. If he had been asked that question, the answer would have been an unqualified "NO"!

Petitioner was under oath and obligated to tell the truth. Without reviewing a list of everyone sent any communication on letterhead, Petitioner could not state the letterhead had **never** been sent to anyone in Nevada. The only truthful response was he did not **remember** sending the letterhead to anyone in Nevada.

Soliciting clients is a more precise issue that was raised by comparing the activities of Petitioner to those of Applicant Waters, who was using his letterhead to solicit in states where he was not licensed to practice! Petitioner stated he never sent letterhead to solicit Nevada residents because Petitioner has **never** solicited legal business **anywhere at any time!**

V 900 NUMBER TELEPHONE SERVICES

Respondent seeks to taint your Petitioner with the generally unfavorable reputation of 900 telephone information service providers providing primarily adult entertainment. Respondent excludes Petitioner's testimony he was the first 900 information provider to place television advertising for psychic services on network television affiliates because he made commercials accurately describing the service provided and **prominently** displaying the price of the call. Although Petitioner does not have benefit of a transcript, he remembers this

testimony.

The State Bar states, "It was unclear from the evidence adduced at the hearing whether or not a business license was and is required to conduct the type of business that the applicant conducts." (Petition, Appendix H),

Respondent now claims that a business license was in fact required and that the Respondent violated zoning laws. These issues were **never raised before!** Indeed, in prior proceedings, Respondent deliberately avoided addressing these issues, as indicated by the above statement in Appendix H of the Petition.

Respondent claims that making an anonymous inquiry to determine licensing requirements demonstrated a lack of candor in dealing with the Clark County Business License Division and a basis of denial of admission. Apparently, Respondent now recognizes that anonymous inquiries to governmental agencies are a common practice among lawyers, and seeks to abandon its earlier position.

VI DISCRIMINATION BASED ON NON-A.B.A. SCHOOL

Respondent claims Petitioner alleged he was singled out for different treatment, but did not prove it. The comparison of reason for denial of admission to Petitioner with the reported cases of others granted admission after more serious misconduct proves Petitioner was treated differently, which is **discrimination!**

Nevada wants to limit the number of practicing attorneys in Nevada to reduce competition in Nevada. California is located adjacent to Nevada. California has a very competitive legal community; Nevada does not.

Most jurisdictions waive the A.B.A. requirement after the applicant has engaged in the practice of law for a certain number of years, Nevada does not. Why?

Most other jurisdictions accept a Masters Degree from an A.B.A. approved school and program as satisfaction of the A.B.A. graduation requirement. Nevada does not. Why?

Most other jurisdictions adopted the A.B.A. model code to permit out-of-state law firms to use their name partners on the letterhead when not admitted in the state. Nevada does not. Why?

Most other jurisdictions do not require that an office be maintained within the state to practice law in the State. Nevada does. Why?

California has 53 law schools, but only 16 are accredited by the A.B.A. (California Lawyer, January, 1996, page 23). Most of the attorneys in California are graduates of law schools not accredited by the A.B.A. (California Bar Journal, December, 1995, pages 9 - 10). Obviously the best way to reduce competition from California lawyers is to require graduation from an A.B.A. approved law school and subject non A.B.A. graduates to the type of inquisition and discrimination given your Petitioner.

VII CONFIDENTIALITY AND DUE PROCESS

Respondent asserts that it keeps proceedings confidential to protect the applicants. However, this objective can easily be obtained by reporting the cases without the names, a practice often utilized in juvenile court proceedings.

It is not necessary to obtain confidentiality by depriving the public of access to decisions. Confidentiality is only necessary to enable Respondent to deprive the public of its right to the decisions and empower misuse of power.

VIII DENIAL OF PROCEDURAL DUE PROCESS

Willner vs. Committee on Character and Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 224 holds that Petitioner is entitled to **notice** of **specific charges** of wrongdoing, and that the failure of the committee to do so and its "fishing expedition" into Petitioner's life violates Petitioner's right to due process.

This issue was raised before the Nevada Supreme Court, which found the notice "including

but not limited to, the unauthorized practice of law in Nevada and such other matters that may reflect on your character and fitness for the practice of law" constituted adequate notice. This is in direct conflict with the ruling of this Court in Willner, supra.

It is interesting that Respondent cites In Re Cheek, 425 Pac. 2d 763. In this case, the procedure followed was that "Before the hearing counsel for the bar served on Petitioner a statement of charges listing 12 specific charges of alleged misconduct." In Check, supra, the Court found 8 of the charges alleging misconduct (each of which was more serious than any misconduct charged to your Petitioner) as "reflecting some discredit on Petitioner, would not of itself warrant denying him admission to the bar." Cheek, supra, was denied admission because he wrote two checks on his employers bank account without authorization and twice lied to his employer about being involved in an accident with a company car.

IX LICENSING AS A COLLECTION TOOL

Your Petitioner argued the three transgressions complained of did not rationally relate to his fitness to practice law or constitute a basis to deny him admission. This is the essence of using licensing as a collection tool. Petitioner was not denied admission for any reason rationally related to the fitness to practice law! Denial of admission thus becomes a tool to collect debts, not to screen applicants based on fitness to practice!

Using licensing as a collection tool is fast becoming the current rage. California and Texas have even enacted laws prohibiting the issuance of drivers licenses to those who owe child support or to those who are not legal residents.

Jurisdictions will continue to use licensing as a collection tool until this Court prescribes the constitutional limitations. This case is before this Court now, and this Court

should use this case to prescribe the constitutional limits of using licensing as a collection tool.

X PREPONDERANCE OF THE EVIDENCE

The three incidents relied upon by Respondent are nothing but minor incidents. The true moral character of Petitioner is established by the 13 testimonials presented to Respondent, which are attached as Appendix B to the Petition.

In Nevada, moral character is established by a preponderance of the evidence. (In Re Farris, 87 Nev. 508, 489 Pac. 2d 1156.) Any objective consideration of the three incidents relied on by Respondent against the extensive testimony provided in thirteen testimonials supplied to Respondent and submitted as Appendix B to the Petition results in a conclusion that Petitioner has sustained his burden of proof. Any objective consideration of Petitioners 24 years in the practice of law in two states without any discipline imposed against the three incidents relied upon by Respondent results in a conclusion that Petitioner has sustained his burden of proof.

XI CONCLUSION

The only explanation of the denial of admission to your Petitioner is that he was the victim of discrimination by Respondent in violation of the Fourteenth Amendment of the United States Constitution. The Petition for Writ of Certiorari should be granted.

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